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Procurement in the time of COVID-19

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Abstract

This piece reflects on the role of public procurement regulation in the face of a situation, such as the COVID-19 pandemic, generating an extremely urgent need for the public sector to buy additional supplies and equipment. Counterintuitively, at a time of heightened public expenditure, public procurement rules are 'deactivated'. That does not mean that unusual procurement mechanisms are not 'activated', though, as the example of the EU's Joint Procurement Agreement shows. It also does not mean that 'reactivating' public procurement regulation will not present challenges, some of which deserve careful consideration.

Keywords: public procurement; extreme emergency; negotiated procedure without publication; COVID-19; joint procurement agreement; economic stimulus.

Introduction

Public procurement is at the forefront of the response to the challenges of COVID-19. Only well-equipped hospitals can save patients' lives without endangering those of the medical, nursing and support workers in the NHS. Shortages of relatively simple consumables such as personal protection equipment (PPE), but also cleaning and hygiene products, can endanger lives and have devastating effects on the resilience of the healthcare system to (continue to) cope with the pandemic. Shortages of essential equipment such as ventilators can have even more direct nefarious impacts on individual lives.

The importance of public procurement and supply chain management has rarely been so prominently in the public eye and political debate – except, perhaps, in the case of

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notorious procurement scandals, such as the recent Brexit-related so-called ‘ferrygate’.¹ In this piece, I reflect on some of the emerging issues in the procurement response to COVID-19 and on the perhaps even bigger challenges that will follow, from a regulatory perspective.

1 ‘Deactivating’ procurement rules

Given the importance of public procurement in the current context, it is perhaps counterintuitive that public procurement regulation vanishes in the face of such challenges. Where unforeseeable and extremely urgent circumstances not attributable to the contracting authority arise, public procurement rules get out of the way to free public buyers up to do all they can to get the required supplies and equipment. This is embedded in the system, probably as a result of the long experience all public administrations have historically had in bending or setting the procurement rules aside when more important (or at least, more urgent) public interests than ensuring probity and economy in the expenditure of public funds arise.

The ‘deactivation’ of procurement rules in the face of extreme emergencies could not have been put more clearly than in the *Guidance on Procurement related to the COVID-19 Crisis*² from the European Commission (the Commission) which stressed that under such conditions:

... public buyers may negotiate directly with potential contractor(s) and *there are no publication requirements, no time limits, no minimum number of candidates to be consulted, or other procedural requirements. No procedural steps are regulated at EU level.* In practice, this means that authorities can act as quickly as is technically/physically feasible – and the procedure may constitute a de facto direct award only subject to physical/technical constraints related to the actual availability and speed of delivery’.³ (emphasis added)

This bold and clear statement and policy steer at EU level echoes the earlier guidance published by UK Cabinet Office in its *Policy Note on Responding to COVID-19*,⁴ which more sparsely (or perhaps cautiously) stated that ‘in responding to COVID-19, contracting authorities may enter into contracts without competing or advertising the requirement’.

- 1 See e.g. University of Bristol Law School, ‘Dr Albert Sanchez-Graells’ #FerryGate evidence discussed in House of Commons emergency debate’ (14 March 2019) <<http://www.bristol.ac.uk/law/news/2019/ferrygate-evidence-discussed-in-hoc-debate.html>>. For more details, see National Audit Office, ‘The award of contracts for additional freight capacity on ferry services’ (February 2019) <<https://www.nao.org.uk/wp-content/uploads/2019/02/The-award-of-contracts-for-additional-freight-capacity-on-ferry-services.pdf>>; and idem, ‘Out-of-court settlement with Eurotunnel’ (May 2019) <<https://www.nao.org.uk/wp-content/uploads/2019/05/Out-of-court-settlement-with-Eurotunnel.pdf>>.
- 2 European Commission, Guidance on using the public procurement framework in the emergency situation related to the COVID-19 crisis [2020] OJ C108I/1. For a full analysis, see A Sanchez-Graells, ‘European Commission’s Guidance on Extreme Emergency Procurement and COVID-19 – some thoughts and a word on the Dyson contract’ (howtocrackanut.com, 1 April 2020) <<https://www.howtocrackanut.com/blog/2020/4/1/european-commissions-guidance-on-extreme-emergency-procurement-and-covid-19-some-thoughts>>.
- 3 European Commission Guidance (n 2) section 1, emphasis added.
- 4 Procurement Policy Note on Responding to COVID-19 (PPN 01/20, 18 March 2020) <<https://www.gov.uk/government/publications/procurement-policy-note-0120-responding-to-covid-19>>. For a full analysis, see A Sanchez-Graells ‘Extreme emergency procurement and COVID-19 – re today’s UK guidance’ (howtocrackanut.com, 18 Mar 2020) <<https://www.howtocrackanut.com/blog/2020/3/18/extreme-emergency-procurement-and-covid-19-re-todays-uk-guidance>>.

Of course, a complete retreat from public procurement rules is a narrow exemption and it needs to be interpreted and applied as such.⁵ Written justification for the use of direct awards, as well as the different steps in the decision-making process leading to the choice of specific contractors and the agreement of specific conditions need to be duly documented and subject to proper record-keeping. Those records will be very relevant for the assessment (and potential challenge) of procurement decisions once the emergency ends, in particular where there are doubts as to the contracting authority's respect for the boundaries of the extreme emergency procurement exemption. Both the Commission's and the Cabinet Office's documents provide detailed and actionable guidance to public buyers on how to check that they face extreme urgency in the carrying out of a specific procurement. Beyond these basic requirements of good administration, no other public procurement rules remain active in the context of the current extreme emergency.

What could be perhaps even more surprising is that the Commission has taken a commercially oriented approach to its guidance and, for example, explicitly endorsed 'active buying' techniques, which should reassure contracting authorities taking abnormal steps to try and secure emergency supplies of PPE, ventilators and any other needed equipment and consumables. Indeed, the Commission guidance explicitly mentions that:

In order to speed up their procurements public buyers may also consider to: contact potential contractors in and outside the EU by phone, e-mail or in person, hire agents that have better contacts in the markets, send representatives directly to the countries that have the necessary stocks and can ensure immediate delivery, [or] contact potential suppliers to agree to an increase in production or the start or renewal of production.⁶

This is certainly welcome and will provide comfort to those taking a more commercial approach than they usually would to market engagement (or scouting).

Further than that, the Commission also endorsed the use of urgent procurement to spur market innovation and matchmaking, thus dispelling doubts about the legality (under procurement rules) of even more active interventions in the market whereby the contracting authority is directly involved in structuring the collaboration between potential suppliers (and even potential competitors, although this will require careful competition law assessment), for example, through COVID-19 challenges or hackathons. In that regard, the guidance is also clear that:

... [t]o satisfy their needs, public buyers may have to look for alternative and possibly innovative solutions, which might already be available on the market or could be capable of being deployed at (very) short notice. *Public buyers will have to identify solutions and interact with potential suppliers in order to assess whether these alternatives meet their needs ... Public buyers are fully empowered under the EU framework to engage with the market and in matchmaking activities.* There are various ways to interact with the market to stimulate the supply and for the medium term needs, the application of urgent procedures could prove a more reliable means of getting better value for money and wider access to available supplies.⁷

The guidance also stresses the relevance of these approaches in terms of boosting the uptake of other strategic considerations so that 'environmental, innovative and social requirements, including accessibility to any services procured, are integrated in the

5 See eg judgment of 4 June 2009 in *Commission v Greece*, C-250/07, EU:C:2009:338, paragraphs 34 to 39.

6 European Commission Guidance (n 2) section 1.

7 Ibid (emphasis added).

procurement process'.⁸ However, it is unlikely that contracting authorities will be able to concentrate efforts on this, even if they can obtain some of the benefits due to engaging in some 'unconventional' procurement approaches, including more digital procurement (and innovation related to 3D printing, for example).

These general policy and strategic guidelines clearly convey the basic message that procurement professionals should do all they can to obtain the urgently required supplies, as well as aim to transition to a more sustainable (and planned, and hopefully less expensive and more innovative) approach in the medium term. The basic message is thus: procure what we need as best as you can and not worry about the rules for now.

2 Proactive international coordination efforts

However, the deactivation of public procurement regulation does not mean that all procurement mechanisms are set aside. On the contrary, there are specific procurement arrangements that seek to coordinate international responses to public health threats. In particular, the EU's *Joint Procurement Agreement for the Procurement of Medical Countermeasures* (JPA)⁹ has also gained notoriety in recent weeks.¹⁰

The JPA is a *sui generis* agreement that allows its signatories to jointly procure the medical countermeasures (that is, not only medication) required to respond to a serious cross-border health threat. As of 30 March 2020, all EU countries, the UK and two EEA countries had signed the JPA, with some very recent COVID-19-related additions to the list of signatories (Sweden, Poland, Norway, Finland and Iceland).¹¹ The EU launched procurement procedures under the JPA, both for PPE¹² and for ventilators.¹³

The purpose and operation of the JPA are largely unknown or misunderstood, even by public procurement specialists. Without getting into technicalities, I would stress that the JPA is simply a mechanism of international collaboration that seeks to avoid duplication of procurement procedures at national level and competition between buyers for the sourcing of the supplies that, not only they may all need, but which they may need in different amounts and at different times. The JPA is primarily a mechanism of coordination of the procurement procedure and, more importantly, of the execution of the supply contracts through specific case-by-case agreements on how to distribute the

8 Ibid.

9 See relevant documents available at <https://ec.europa.eu/health/preparedness_response/joint_procurement_en>. For in-depth discussion, see A Sanchez-Graells, 'The EU's Joint Procurement Agreement: how does it work, and why did the UK not participate?' (*howtocrackanut.com*, 4 April 2020) <<https://www.howtocrackanut.com/blog/2020/4/4/the-eu-joint-procurement-agreement-how-does-it-work-and-why-did-the-uk-not-participate-procurement-pill-with-recording>>.

10 The JPA needs to be distinguished from the also novel and rather unconventional creation of an EU stockpile of necessary supplies – the rescEU stockpile; see Commission Implementing Decision (EU) 2019/570 of 8 April 2019 laying down rules for the implementation of Decision No 1313/2013/EU of the European Parliament and of the Council as regards rescEU capacities and amending Commission Implementing Decision 2014/762/EU [2019] L 99/41; as amended by Commission Implementing Decision (EU) 2020/414 of 19 March 2020 amending Implementing Decision (EU) 2019/570 as regards medical stockpiling rescEU capacities [2020] OJ L 821/1.

11 See <https://ec.europa.eu/health/preparedness_response/joint_procurement/jpa_signature_en>.

12 European Commission, 'Coronavirus: Commission bid to ensure supply of personal protective equipment for the EU proves successful' (24 March 2020) <https://ec.europa.eu/commission/presscorner/detail/en/ip_20_523>. This followed a first unsuccessful attempt; see contract award notice 2020/S 051-119976 of 12 March 2020.

13 It has been reported that the procedure was launched on 16 March 2020, although there is no public information on the outcomes as of the time of writing (6 April 2020).

quantities procured across participating countries, allowing for a concentration of supplies on those in acute need, as well as donation of quotas. The JPA is also a mechanism that can aggregate buying power and improve the participating countries' collective-bargaining position, although that is highly dependent on the supply-side structure of the relevant markets.

The governance of the JPA is two-tiered, with a first-tier JPA-wide Steering Committee with representation from all signatories entrusted with general issues in the administration of the cross-border collaboration, and a second-tier Specific Procurement Procedure Steering Committee (SPPSC) for each of the procurement procedures launched under the JPA, with representation of the participating states and the Commission only.¹⁴ Signatories of the JPA have no obligation to participate in any specific joint procurements and thus the composition of the SPPSC is variable, with the committed financial contribution being a relevant factor in the allocation of votes. The SPPSC retains decision-making powers and aims to operate on the basis of common accord or, failing that, qualified majority for the most relevant decisions. The JPA only transfers to the Commission an executive role in the design and execution of the procurement procedure, which is carried out under the strict surveillance of and with a range of necessary approvals by the SPPSC. Moreover, participating countries are not barred from engaging in parallel procurement procedures at national level (which can be a weakness rather than a strength of the system).

The JPA has a *sui generis* legal nature. It is subjected to EU law and operates as a budgetary implementing measure of Decision 1082/2013/EU.¹⁵ Litigation resulting from disputes between signatories of the JPA is to be heard by the Court of Justice of the European Union (CJEU). Procurement under the JPA is carried out in accordance with the Financial Regulation – currently, the Omnibus Regulation 2018/1046/EU.¹⁶ This implies that any challenges to the procurement decisions need to be heard by the General Court.¹⁷

However, each of the participating countries is meant to enter into direct legal and economic relationships with the relevant contractors and '[t]he law applicable to framework or direct contracts pursuant to [the JPA] and the competent court for the hearing of disputes under these contracts shall be determined in these contracts'.¹⁸

14 See European Commission, Explanatory Note on the Joint Procurement Mechanism (December 2015) <https://ec.europa.eu/health/sites/health/files/preparedness_response/docs/jpa_explanatory_en.pdf>.

15 Decision No 1082/2013/EU of the European Parliament and of the Council of 22 October 2013 on serious cross-border threats to health and repealing Decision No 2119/98/EC [2013] L 293/1. See European Commission, Considerations on the legal basis and the legal nature of the Joint Procurement Agreement (undated) <https://ec.europa.eu/health/sites/health/files/preparedness_response/docs/jpa_legal_nature_en.pdf>.

16 Regulation (EU, Euratom) 2018/1046 of the European Parliament and of the Council of 18 July 2018 on the financial rules applicable to the general budget of the Union, amending Regulations (EU) No 1296/2013, (EU) No 1301/2013, (EU) No 1303/2013, (EU) No 1304/2013, (EU) No 1309/2013, (EU) No 1316/2013, (EU) No 223/2014, (EU) No 283/2014, and Decision No 541/2014/EU and repealing Regulation (EU, Euratom) No 966/2012 [2018] L 193/1. For discussion of some of the main requirements, see A Sanchez-Graells, 'Transparency in procurement by the EU institutions', in K-M Halonen, R Caranta and A Sanchez-Graells (eds), *Transparency in EU Procurements: Disclosure within Public Procurement and During Contract Execution*, vol 9 EPL Series (Edward Elgar 2019) 82–104.

17 On the limitations that this implies, see European Court of Auditors, Special Report No 17/2016, 'The EU institutions can do more to facilitate access to their public procurement' (13 July 2016) <<https://www.eca.europa.eu/en/Pages/DocItem.aspx?did=37137>>.

18 JPA, article 42(2).

The JPA is thus a non-exclusive ‘procurement only’ *sui generis* agreement. The only clearly pre-defined legal issues concern the subjection of the JPA and the ensuing procurement (up to award) to EU law and CJEU jurisdiction only. Its final legal structure is left to specific decisions of the participating member states (and market acceptability).

The legal set-up of the JPA and, more importantly, the sets of framework agreements and specific contracts which it is meant to generate are yet to be subjected to detailed analysis.¹⁹ The COVID-19 crisis and the use of the JPA in responding to it will be a test of this mechanism for international coordination at European level and provide additional practical insights into its operation. At the time of writing, the emerging picture is mixed, although only time will tell.

The same can be said of the UK’s decision not to participate in the JPA and rather *go it alone* in seeking to procure large numbers of ventilators.²⁰ I would be remiss not to put on the record that I harbour serious doubts as to the drivers for that decision, and some specific contract awards in particular,²¹ and that I would like to see a full enquiry into that decision as soon as the UK Parliament is back in session.²²

3 Some challenges in reactivating procurement after the COVID-19 crisis

Looking beyond the COVID-19 crisis, I think three further challenges lie ahead.

The first one concerns the reactivation of standard procurement rules, once the conditions of extreme emergency subside. This will not happen overnight, nor in the same way across contracting authorities or across categories of supplies and equipment. It will thus be a challenge for each contracting authority, but also for those with oversight powers, to make a call as to when ‘normal procurement’ must resume. Litigation on these issues is also likely to arise, in particular if the extreme emergency situation lasts for a long time and economic operators need to challenge each opportunity to get public sector contracts shielded from competition under the cover of the extreme urgency exemption.

The second challenge lies in learning from the crisis. Significant thought and research will have to go into understanding what contingency planning (and procurement) needs to be in place to ensure an adequate level of readiness for the next pandemic. It will also be very important to extract lessons from the international coordination efforts (in the EU, but also beyond). Both of these areas of analysis are likely to be very prominent, and they should.

But this should not lead us to forget that there is more learning to be extracted from this situation. An important area for research and analysis concerns the ‘unconventional’ or more commercial approaches to procurement that public buyers are taking once the rules have been deactivated. I will be personally very interested to see to which extent, perhaps with minor tweaks, they can be adopted in ‘normal times’ and under full application of the procurement rules. My working hypothesis is that most of the practices

19 For discussion of related issues, with further references, see A Sanchez-Graells, ‘The emergence of trans-EU collaborative procurement: a “living lab” for European public law’ (2020) 29(1) Public Procurement Law Review 16–41.

20 For discussion, see M Flear, ‘EU joint procurement – UK’s delayed participation undermines the NHS and risks lives’ (*UK in a Changing Europe*, 27 March 2020) <<https://ukandeu.ac.uk/eu-joint-procurement-uks-delayed-participation-undermines-the-nhs-and-risks-lives/>>.

21 While I have no doubts about the general legality of the actions of the UK government, my main concern is with the award of an emergency contract to a consortium that, at the time of writing, is yet to obtain regulatory approval for its proposed respiratory ventilator. For details, see Sanchez-Graells (n 2).

22 For extended discussion, see the debate in multiple entries between P Telles in *telles.eu* (starting on 24 March) and myself in *howtocrackanut.com* (for the same period).

that will emerge from the flexibility created under the current ‘no rules’ scenario can be retained in the future, contrary to the standard claim that procurement rules are unduly rigid and too limiting on the exercise of discretion by public buyers. I look forward to having a chance to test it.

A third possible challenge lies in making sure that the situation of extreme emergency does not morph into one where public procurement is used purely as an economic stimulus mechanism, with the ensuing disregard (or bending) of the rules to achieve specific economic goals. This risk is in two parts. One is about protectionism and the use of procurement for industrial policy purposes, of which there were already very clear signs before the COVID-19 crisis (in Europe and in the UK). The other part concerns the target for the (additional) public expenditure to be channelled through procurement.

Here, a lesson from the use of procurement by Spain in the aftermath of the 2008 financial crisis may be a cautionary tale. A significant proportion of additional public expenditure (the so-called ‘Plan E’) was dedicated to minor works procured by local authorities (notoriously, improving sidewalks and fixing potholes). While that was seen to address a short-term employment problem, it certainly did not do much to improve the country’s infrastructure or to prepare it for future changes in labour markets.

Post COVID-19, every procurement package aimed at restarting the economy needs to avoid that short-termism. In my opinion, the (unavoidable) stimulation of the economy through procurement needs to be oriented towards ground transport infrastructure or digital infrastructure and services projects, have a very clear environmental orientation and contribute to the fight against climate change, as well as be coupled with significant investment in re-skilling and life-long education programmes.

Conclusion

On the whole, while procurement regulation is dormant in the initial phase of the COVID-19 crisis, it will have a very significant role to play as it subsides and when it passes. This is perhaps a counter-cyclical understanding of procurement and its role in a crisis, but I think it reflects the oddities of these challenging times of COVID-19.

